In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 268

DANIEL J. LEARY AND SADIE D. LEARY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (O.R. 61–66),[1] in which the amounts of income tax deficiencies and penalties were determined, is reported at 1945 P-H Memo T. C., pars. 45,042 and 45,123. The opinion of the District Court in this collection suit (G.A. 1a-7a) is reported at 228 F. Supp. 467. The *per curiam* opinion of the court be-

[1] The designation "O.R." refers to the original record in the court below; "G.A." refers to Appendix B of the Government's Appendix in the court below (*viz.*, the opinion of the District Court); "A.A." refers to the Appellants' Appendix in the court below. All of these documents have been certified to this Court.

740-980—64

low (Pet. 1a-2a), affirming the judgment of the District Court, is reported at 330 F. 2d 497.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1964 (Pet. 1a-2a), and a petition for rehearing (Pet. 3a) was denied on April 13, 1964. The petition for a writ of certiorari was filed on July 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether both courts below correctly concluded that the record in this case presented no genuine issue of fact and that entry of summary judgment was therefore appropriate.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939, Section 272, 53 Stat. 82, 83:

> SEC. 272. PROCEDURE IN GENERAL.
>
> (a) (1) *Petition to Board of Tax Appeals.* If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its

collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. * * *

* * * * *

(c) *Failure to File Petition.* If the taxpayer does not file a petition with the Board within the time prescribed in subsection (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the collector.

Federal Rules of Civil Procedure:

Rule 56—SUMMARY JUDGMENT

(a) *For Claimaint.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * * * *

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * * * *

STATEMENT

This suit for the collection of income taxes involves three consolidated District Court actions: (1) Civil No. 626, initiated in 1941 to obtain collection of a jeopardy assessment made on April 15, 1940, and to foreclose tax liens upon certain insurance policies owned by Daniel J. Leary (A.A. 1a, 8a–16a); (2) Civil No. 1707, initiated in 1946 to reduce to judgment a Tax Court determination with respect to the years 1934 and 1935 (A.A. 4a, 17a–20a); and (3) Civil No. 1708, initiated in 1946 to reduce to judgment a Tax Court determination as to 1933 (A.A. 6a, 21a–24a).

On June 7, 1940, the Commissioner of Internal Revenue formally notified the petitioners of deficiencies for the years 1933, 1934, and 1935 (Pet. 7). Ninety days thereafter, on September 5, 1940, petitioners filed a petition for review in the then Board of Tax Appeals, in accordance with Section 272(a) of the Internal Revenue Code of 1939 (O.R. 82). On January 24, 1945, the Tax Court issued its Memorandum Findings of Fact and Opinion determining substantial tax deficiencies for the years 1933 through 1935. It found, *inter alia*, that Daniel Leary was controller of the City of Waterbury, Connecticut, for the years

1931 through 1937; that early in 1938 he and others were convicted of conspiracy to defraud the city of large amounts of money; that when the convictions were affirmed on appeal, Leary (who was at liberty on bail) forfeited his bail bond and fled from Connecticut; and that his whereabouts since then remained unknown to the state authorities and to counsel of record.

The record does not disclose why the instant collection suits remained undisposed of for many years.[2] On October 25, 1962, the government filed motions for summary judgment in all three cases (A.A. 2a, 5a, 7a). Nine exhibits were filed for possible consideration on the motion, including a photostatic copy of the docket of the Board of Tax Appeals (O.R. 82), showing that appellants' petition for review was timely filed on September 5, 1940, rather than on October 9, 1940, as the complaints in two of the cases alleged (A.A. 19a, 22a). Petitioners filed no exhibits or affidavits in opposition (G.A. 3a). The motions were granted on May 17, 1963, and "Partial Summary Judgment" was entered on May 22, 1963 (A.A. 3a, 6a, 7a–8a, 25a–26a). On appeal therefrom, the Court of Appeals affirmed, *per curiam* (Pet. 1a–2a).

[2] The Department of Justice files indicate that, following institution of the suits, petitioner Daniel J. Leary served six years in a Connecticut penitentiary on his conviction for conspiring to defraud the City of Waterbury. He had been apprehended in Chicago in 1946. The Department's files further show that between 1952 and 1961 a drawn-out series of negotiations took place between the government and the petitioners regarding various offers in compromise of the tax liability. The negotiations were complicated by (1) the existence of attachments of the City of Waterbury against much of petition-

ARGUMENT

Petitioners' contention that the record in this case presents a genuine factual issue as to whether the Tax Court had jurisdiction of their case is wholly without substance. Petitioners rely upon the erroneous allegations in two of the government's complaints (A.A. 19a, 22a) that the petition for review was filed in the then Board of Tax Appeals (hereinafter referred to as Tax Court) on October 9, 1940—more than 90 days after the deficiency notices were mailed—and was therefore untimely.[3] But a photo-

ers' property; (2) a related civil suit against Daniel Leary in the amount of $600,000 brought by the City of Waterbury; (3) civil litigation between Daniel Leary and his brother as to the ownership of certain real property on which the federal government had a lien; and (4) disputes as to the ownership of insurance policies in which petitioners were alleged to have an interest.

The District Court in ruling on the motion for summary judgment, stated (G.A. 6a; O.R. 109–110):

> The more than twenty year history of this long drawn out case reveals that the defendants have been accorded every opportunity at many stages in its progression to assert and present any meritorious defenses to these actions they might have. There has, nevertheless, been a persistent and undeviating attempt by Leary to prevent any direct determination of the merits by the courts. * * * There has been no element of mistake, inadvertence, surprise or excusable neglect to hinder Leary from presenting any meritorious defense he might have had.

And the Court of Appeals, in sustaining the grant of summary judgment, observed that it was satisfied "that the delay in obtaining of judgment in the consolidated case was not entirely the fault of the Government" and that "neither the Government nor the taxpayers have been prejudiced" (Pet. 2a).

[3] See Section 272 (a) of the Internal Revenue Code of 1939, *supra*, p. 2.

It should be noted that if the Tax Court had been without

static copy of the Tax Court's docket sheet shows that the petition was filed on September 5, 1940, 90 days after the deficiency notices were mailed on June 7, 1940 (A.A. 18a, 22a; G A. 4a; O.R. 82, 107). The Tax Court therefore had jurisdiction to determine petitioners' tax liability. And since petitioners never appealed from the Tax Court's decision, its findings as to liability are *res judicata* in the present proceeding. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597; *Tait* v. *Western Md. Ry. Co.*, 289 U.S. 620, 624.

The pleadings, depositions, affidavits, and admissions filed below clearly demonstrated—and without contradiction by petitioners—that no real issue of fact remained to be disposed of by trial, *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 467; *Sartor* v. *Arkansas Gas Corp.*, 321 U.S. 620, 627. The materials presented below on the motion for summary judgment did not involve any determination of credibility. See *Colby* v. *Klune*, 178 F. 2d 872, 873 (C.A. 2d).

To create a real issue of fact below it was incumbent upon petitioners, once the government had filed the Tax Court docket sheet, to produce (or at least

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jurisdiction (*i.e.*, if petitioners had elected not to avail themselves of that forum by filing a petition for review within the 90-day period) the only alternative course open to them would have been to pay the assessed tax and bring a suit for refund in the United States District Court. Sections 3772(a)(1) and 3772(a)(2) of the Internal Revenue Code of 1939, now Sections 6532(a) and 7422 of the 1954 Code. In the meantime the government would be free to pursue its statutory collection remedies.

specify) some evidence tending to show that that document was incorrect and that petitioners had not, in fact, filed their petition on September 5, 1940. *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (C.A. 2d); *Bruce Construction Corp.* v. *United States*, 242 F. 2d 873, 875 (C.A. 5th). But petitioners made no attempt to meet that burden, nor do they now suggest what evidence they might be able to produce at a trial to demonstrate that they did not file a petition for review on September 5, 1940. Petitioners not only failed to serve opposing affidavits in the District Court, as they were authorized to do under Rule 56(e) of the Federal Rules of Civil Procedure, but they made no attempt to utilize the liberal discovery procedures authorized by the Rules. Their "failure to do so precludes [appellate courts] from finding that they have raised any factual issues which may be considered 'genuine'." *Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (C.A. 2d).[4]

[4] The contention (Pet. 13–17) that petitioners have been subjected to a forfeiture without due process of law is frivolous. It appears to be based on the hypothesis that a taxpayer may file a petition in the Tax Court to review a determination of tax deficiencies by the Commissioner, and then indefinitely frustrate that determination by absenting himself. Here more than four years elapsed between petitioners' filing of their petition and the trial in the Tax Court, ample time for Daniel J. Leary to have arranged for the preparation and presentation of his case. The Tax Court acted within its powers when it decided, pursuant to its Rule 29, that "The unexcused absence of a party or his counsel on the day set for the hearing of any proceeding will not be the occasion for delay. The hearing will proceed and the case will be regarded as submitted on the part of the absent party or parties." Cf. *Katz* v. *Commissioner*, 188 F. 2d 957, 958 (C.A. 2d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1964.

U.S. GOVERNMENT PRINTING OFFICE 1964